AKBERDIN HJ ABDUL KADER & ANOR *a*

v.

MAJLIS PEGUAM MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: R1-17-02-2001]
14 SEPTEMBER 2001

LEGAL PROFESSION: *Admission - Whether proper - Whether period of pupillage served under a master in active practice for seven years - Whether master's tenure as a magistrate fell within "active practice" - Whether estoppel applied once admission was made - Whether duty upon Bar Council to ensure necessary qualifications present before admission - Legal Profession Act 1976, ss. 13(1), 73(1)* *c*

WORDS & PHRASES: *"active practice" - Legal Profession Act 1976, s. 13(1) - Requirements of a master to be in "active service" for seven years - Whether tenure of master in judicial and legal service falls within "active service" - Whether "active service" is confined to active private practice as an advocate and solicitor* *d*

e

The 2nd plaintiff was admitted as an advocate and solicitor after serving her period of pupillage with the 1st plaintiff. Less than two months after her admission, the Bar Council wrote to the 1st plaintiff stating that he was not qualified to act as a master under s. 13(1) of the Legal Profession Act 1976 ('the Act') as he had been in active practice for less than seven years. The Bar Council took the view that the 1st plaintiff's tenure as a magistrate for six years did not fall within "active practice" under s. 13(1) of the Act. *f*

The plaintiffs now sought to declare, *inter alia*, that the phrase "active practice" under s. 13(1) should also include the tenure served in the judicial and legal service by an advocate and solicitor, and that the order of admission of the 2nd plaintiff was correct, binding, absolute and irreversible. *g*

Held:

[1] The draftsman omitted to express the kind of active practice or the capacity of active practice intended in s. 13(1) of the Act as obviously "practice" was understood to mean private practice and not service in the judicial and legal service. So alien is the ordinarily received concept of "practice" to service in the judicial and legal service that if the draftsman had intended to encompass such service in the idea represented by the words "active practice" he would have used other words to achieve his *h* *i*

intention. Although he did not qualify the word "practice" with "private" or "as an advocate and solicitor", as in the other provisions of the Act, that does not mean that what is left unexpressed in s. 13(1) is something different and wider. What is expressed in the other provisions represents what is left unexpressed in s. 13(1). Therefore, "active practice" in s. 13(1) must mean active private practice or active practice as an advocate and solicitor.

[2] In s. 21(1) the draftsman took the trouble to express the capacity "as an advocate and solicitor" which he did not do so in s. 13(1) as the capacity therein was obvious. That he did express the capacity in s. 21(1) was merely a failure to be impeccably consistent. Had he anticipated that what he intended in s. 13(1) would be misunderstood, he would have qualified "active practice" in s. 13(1) with the words "as an advocate and solicitor", although qualifying "active practice" with the word "private" in between the said two words would have also served the purpose.

[3] It would be unsafe to apply the secondary meaning of "practice" in *Black's Law Dictionary* for the purpose of interpreting s. 13(1) without a true knowledge of the system prevailing in the jurisdiction from which the meaning is derived or of the actual contexts in which the term "practice of law" is commonly used with such a meaning.

[4] The estoppel argument is hindered by s. 17(3) which implies that the advocate and solicitor concerned is at risk of being removed from the Roll if after admission something is found to be wrong. The Bar Council is given a right to object to the admission but that right does not come with a duty to the petitioner to ensure that the petition is in order. The Bar Council owes no duty to a petitioner or his master to ensure that they have the necessary qualifications in relation to the petitioner's admission. Its duty is to solely ascertain whether or not they are qualified.

[5] The declaration that the order of admission of the 2nd plaintiff was correct, binding, absolute and irreversible could not be made in view of the fact that the 2nd plaintiff was liable to be removed from the Roll under s. 17(3) and such a declaration might embarrass a decision under that section. Alternatively, if it would not have such an effect, the declaration would be in vain because no one was or would be challenging the order of admission or the fact that the 2nd defendant had became an advocate and solicitor since the order was made. The jeopardy that the 2nd plaintiff would face as a result of the court's interpretation of s. 13(1) was removal from the Roll under s. 17(3) and not a reversal of the order of admission.

[6] With the refusal of the declarations sought by the plaintiffs, the 2nd plaintiff's name would nevertheless be still on the Roll. Firstly, if the plaintiffs had not made the present application, the court would have to be moved by the Bar Council or some other party with the proper *locus standi* to act under s. 17(3). There was virtue in leaving it to the Bar Council to expressly move the court in that it would have an opportunity, if it had not done so, to deliberate on the matter before deciding to act. Secondly, the Bar Council would have to bring its case within the terms of s. 17(3) which would require the offending petition and documents thereto to be before the court, and it was not before the court presently. Thirdly, considering the nature and circumstances of the case, there might be questions and principles to be considered and debated, and considerations to be taken into account for a decision under s. 17(3) for which the necessary factual material was not before the court.

[Application dismissed; no order as to costs as agreed by parties.]

Legislation referred to:
Advocates and Solicitors Ordinance 1947, s. 5(3)
Legal Profession Act 1976, ss. 13(1), (3)(b), (d), 16, 17(3), 21(1), (3), 36(2)

Other source(s) referred to:
Black's Law Dictionary, 7th edn

For the plaintiffs - Wong Kian Kheong; M/s Akberdin & Co
For the defendant - Hj Sulaiman Abdullah

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:
The first plaintiff was admitted as an advocate and solicitor on 1 March 1991. He practised as an advocate and solicitor for three months, that is until 31 May 1991. On 1 June 1991 he joined the judicial and legal service and served as a magistrate for six years until he resigned from the service on 2 June 1997. He resumed private practice on 1 July 1997. While he was in the service he retained his status as an advocate and solicitor.

On 17 August 1998 he took the second plaintiff to serve with him as a pupil the period of pupillage that she was required to satisfactorily serve as one of the conditions to be satisfied before she could be admitted as an advocate and solicitor, he becoming the master. Almost a year later, on 15 July 1999, the second plaintiff was admitted as an advocate and solicitor and thereafter practised in that capacity with the first plaintiff's firm. The Bar Council, the defendants here, did not object to her petition for admission. Neither did the

Attorney General nor the State Bar Committee, the two other parties who were, under s. 16 of the Legal Profession Act 1976, entitled to object. Earlier on, when the first plaintiff, as master, applied for permission under s. 36(2) of the Act for the second plaintiff to appear in court for the limited purposes mentioned in the section, neither the Bar Council nor the State Bar Committee had objected to the first plaintiff's standing.

On 26 August 1999, less than two months after the second plaintiff's admission, the Bar Council wrote to the first plaintiff to say that in their view, going by their records, he was not qualified under s. 13(1) of the Act to be a master to the second plaintiff, and to ask for an explanation to enable them to determine the appropriate action to be taken.

Section 13(1) of the Act provides as follows:

> Subject to subsection (4) a pupil shall serve his period of pupillage with an advocate and solicitor who is and has been in active practice in Malaysia for a total period of not less than seven years immediately preceding the date of commencement of his pupillage.
>
> Provided that the Bar Council may on special grounds allow a pupil to serve his period of pupillage with an advocate and solicitor of less than seven years' standing.

The Bar Council in their letter said in effect that the first plaintiff did not qualify as a master because he had been in active practice for less than seven years immediately preceding 17 August 1998, the date of commencement of the second plaintiff's pupillage. The Bar Council obviously took the view that the first plaintiff's service in the judicial and legal service did not count as "active practice". Counting backwards from 17 August 1998 and excluding the period of such service but including the initial period of active practice, the first plaintiff had a period of active practice of almost one year and five months, and I cannot think how the period of two years and two months mentioned in the Bar Council's letter was reckoned. In the letter, the Bar Council said that the first plaintiff had, on 1 September 1998, after the commencement of the second plaintiff's pupillage, declared in the "Form concerning Particulars of Master" that he had seven years of active practice.

The first plaintiff in his reply letter dated 24 September 1999 said in effect that he interpreted the words "active practice" in s. 13(1) as including service in the legal and judicial service.

By this application, filed on 21 February 2001, the plaintiffs seek four declarations, but I think there are effectively two, because the second and the third, which I need not set out, are directly dependent on the first, which, as prayed for, is in the following terms:

a declaration that the meaning of the phrase "active practice" under section 13(1) ... includes not only the practice of advocates and solicitors with seven (7) years standing but also the tenure served in the judicial and legal service by an advocate and solicitor.

There is no doubt from the wording of s. 13(1), as the plaintiffs themselves seem to recognise by the way in which they frame the first declaration, that during the period of pupillage and during the seven years immediately preceding the date of commencement of the pupillage, the master must be an advocate and solicitor, as the first plaintiff in fact was during that period and the seven years. But that is not enough. The master must also, during that period and the seven years, be in active practice. Those two requirements for the period and the seven years are, to my mind, what the effect of the phrase "is and has been" in the section is.

Therefore, looking at the proposed declaration, which is framed in line with the terms of s. 13(1) and is therefore correctly framed, in my view the question, and the only question, that arises from it is, is serving in the judicial and legal practice being "in active practice" for the purposes of s. 13(1)?

If the answer to that question were in the affirmative, the consequence would be that during the period of pupillage and during the seven years a master could be an advocate and solicitor serving in the judicial and legal service. But Encik Wong Kian Kheong for the plaintiffs is unable to stomach such a consequence. That is why right at the beginning of his submission he put the question in a somewhat weird way by reference to the actual circumstances of the first plaintiff. I have not been able to record exactly the way in which he puts the question, but it was a way which indicated that he would accept service in the judicial and legal service as active practice only if it were sandwiched between two periods of private practice, just as in the case of the first plaintiff. I do not find that to be a valid way of putting the question. It is not justified by the manner in which the first declaration is framed or by the terms of s. 13(1). The proper way is the way that I have set out, with the consequence that I have set out if the answer were in the affirmative, and if that consequence is unpalatable it is because an answer in the affirmative is unacceptable and is not the right answer. I am entirely with Encik Wong in being unable to accept such a consequence and that in itself is a compelling reason for rejecting an answer in the affirmative.

Encik Wong referred to certain other provisions in the Act where the term "active practice" is used with a qualification, or in association with words, that are not present in s. 13(1) and that render it beyond question that what is intended in those provisions is private practice.

Paragraph (b) of s. 13(3) sets out one of the qualifications for exemption from the required period of pupillage. The paragraph concerns a person who has been a pupil or read in the chambers of "a legal practitioner in active private practice" in the Commonwealth. The word "private" is present.

Paragraph (d) of s. 13(3) specifies another qualification for exemption from the required period of pupillage. Paragraph (d) is about a person who has been engaged "in active practice as a legal practitioner" by whatever name called in any part of the Commonwealth. The word "private" is absent, but "active practice" is qualified by "as a legal practitioner".

Then there is s. 21(1) which is in the following terms:

> No advocate and solicitor shall, without the special leave in writing of the Board, qualify as a principal unless he has been in active practice as an advocate and solicitor in Malaysia for a period of not less than seven years immediately preceding the commencement of the articles and is in active practice.

The term "active practice" first appearing there, is qualified by the words "as an advocate and solicitor".

Section 21(3) prohibits a principal from taking or retaining any articled clerk after he has ceased from "active practice as an advocate and solicitor ...". The term "active practice" is there similarly qualified.

Encik Wong argued that if Parliament had intended to confine "active practice" in s. 13(1) to private practice or to practice as an advocate and solicitor it would have expressed its intention in the section as it has expressed it in those other provisions, and since in the section such an intention has not been expressed, Parliament could not have there intended to so confine "active practice". Encik Wong argued that the differences in wording between s. 13(1) and the other provisions give rise to a difference in interpretation.

I do not think that what we have here is the kind of differences in wording that give rise to a different interpretation. When the draftsman drafted s. 13(1), what he omitted to do was to express what kind of active practice, or active practice in what capacity, was it that he had in mind. And I think he did not do so because he thought it was so obvious. When I first read s. 13(1) on its own, before hearing any argument, I straight away understood "practice" to mean private practice because I would not term service in the judicial and legal service as a practice. The draftsman too must have assumed that no one would so construe the word "practice". So alien is the ordinarily received concept of "practice" to service in the judicial and legal service that if the draftsman had intended to encompass such service in the idea represented by

the words "active practice" he would have used other words to achieve his intention. That the draftsman, when he came to draft ss. 13(3)(b) and 21(1) – just to take those two provisions – did express what he did not express in s. 13(1), that is by the qualifying words "private" or "as an advocate and solicitor", does not mean that what is left unexpressed in s. 13(1) is something different and wider. While it is true that, literally, there are differences in wording between s. 13(1), on the one hand, and those various other provisions, on the other hand, altogether they give a strong impression of unity of thought that cannot be dispelled by the differences, so much so that I would say that what has been expressed in those other provisions represents what is left unexpressed in s. 13(1). What Encik Wong has attempted to do is to persuade me to construe a term in a statute so as to include within it a meaning that is alien to the commonly accepted meaning of the term, and to seek to do so by dint of the existence in other parts of the statute of the use of the term with qualifications that consist with the ordinarily-accepted meaning of the term and do not even hint at the alien meaning. I do not think that that is an acceptable way of construing a statute. In my judgment "active practice" in s. 13(1) must mean active private practice or, which means the same thing, active practice as an advocate and solicitor.

Encik Wong also pointed out the fact that s. 5(3) of the repealed predecessor Advocates and Solicitors Ordinance 1947 used different words to describe the qualifications of a master, namely, "a practising practitioner of not less than seven years' standing at the Bar of the Federated Malay States, or one of the Straits Settlements, or of the State of Johore, or of the Malayan Union or of any two or more of such Bars". He focused on the words "not less than seven years' standing at the Bar" and said that if Parliament had intended the seven years' active practice in s. 13(1) to refer to private practice or practice as an advocate and solicitor, Parliament would have used those words. I will simply say that Parliament would not, in any event, have used those words in s. 13(1) because those words were used in s. 5(3) because it was necessary to use them then in the circumstances of the section and because there was no necessity to use them now to convey the intention of s. 13(1). The words that the draftsman would have used had he anticipated that what he intended would be misunderstood are "active private practice" or "active practice as an advocate and solicitor," although, considering what I would call the pattern of expression in those various provisions, I think the fitting choice would have been the latter words.

For pattern of expression, I think the best and nearest comparison for s. 13(1) is s. 21(1). In s. 13(1) the expression is "an advocate and solicitor ... in active practice". It consists of two elements, that is, one, an advocate and solicitor as the subject and, two, the work that he has to be in, that is active practice.

It lacks the element of the capacity in which the subject advocate and solicitor has to be in the work. In s. 21(1) the expression is "advocate and solicitor ... in active practice as an advocate and solicitor". It has the same two elements plus a third element that is missing in s. 13(1), namely the capacity in which the subject advocate and solicitor has to be in the work of private practice, and the capacity is "as an advocate and solicitor".

Since the subject in the two sections is an advocate and solicitor, if the capacity were missing in s. 21(1) and if it were asked in what capacity is it that the two sections require him to be in active practice, it would be obvious that it is as an advocate and solicitor. When one speaks of a person being at work, it will not be obvious what is the capacity in which he is at work. But when one refers to a person specifically according to his vocational status as, say, a teacher, and speaks of a teacher being or having to be at work, one obviously means at work in his capacity as a teacher. In s. 21(1) the draftsman took the trouble to express the capacity "as an advocate and solicitor", which he did not do in s. 13(1), and that was because, as I said, he must have thought that the capacity was obvious. That he did express the capacity in s. 21(1) is, I think, merely a failure to be impeccably consistent. Had he anticipated that what he intended in s. 13(1) would be misunderstood, to be impeccably consistent he would have qualified "active practice" in s. 13(1) with the words "as an advocate and solicitor", although qualifying "active practice" with the word "private" in between the two words would also have served the purpose.

Encik Wong would construe "practice" in s. 13(1) to mean "practice of law" because he referred to the meaning of that term in *Black's Law Dictionary*, 7th edn. Of course, as to what the "practice" in the section is of, it must be the law. Primarily, that dictionary gives "practice of law" the meaning of private practice. It says that it is "the professional work of a duly licensed lawyer, encompassing a broad range of services such as", and then follows an enumeration of some of the services. But Encik Wong relied on a secondary meaning, which is expressed thus: "The term also includes activities that comparatively few lawyers engage in but that require legal expertise, such as drafting legislation and court rules". I think it is unsafe to apply that secondary meaning for the purposes of interpreting s. 13(1) without a true knowledge of the system prevailing in the jurisdiction from which the meaning is derived or of the actual contexts in which the term "practice of law" is commonly used with such a meaning. The meaning there focuses on specific specialised activities which few lawyers engage in. Drafting legislation and court rules are particularly mentioned. Does the meaning encompass the work of a government legislative draftsman? There would arise a problem from applying the meaning literally to the position in this country, because it would result

in officers in the judicial and legal service who do legislative drafting to be considered as in active practice of law and others who do not as not being in active practice of law. And applying the meaning to the first plaintiff particularly, he would not qualify because he was serving as a magistrate and it cannot be said that the activities of a magistrate require legal expertise.

This brings me to something that Encik Wong said to advance an argument about the public-protection purpose of s. 13(1) that was made in support of a purposive interpretation of the section. He said that a person serving in the judicial and legal service is in no worse position as regards knowledge of the law and of the practice of the law than a private practitioner. I shall only say that I believe, from my own observation and limited experience, not having been in private practice, that there are many things that one does not learn or encounter in the service about the practice of the law that one learns or encounters in private practice.

In view of my opinion as to the meaning of active practice in s. 13(1), the first declaration, and with it the second and the third, must be refused.

The fourth declaration is a declaration that the order of admission of the second plaintiff of 15 July 1999 is correct, binding, absolute and irreversible and that she has become an advocate and solicitor since the time the order was made.

Encik Wong's submission in support of the fourth declaration comes down to this, that notwithstanding that the second plaintiff may not have satisfied s. 13(1), the Bar Council are estopped from challenging the order of admission of 15 July 1999 because they did not object to the second plaintiff's petition for admission or the first plaintiff's earlier application under s. 36(2), thereby intentionally permitting the first plaintiff to believe that he was qualified as a master.

In my judgment, the estoppel argument is hindered by s. 17(3), which provides as follows:

> If at any time after the admission and enrolment of any petitioner as an advocate and solicitor, it is shown to the satisfaction of the Court that any petition, affidavit, certificate or other document filed by a petitioner contains any statement which is false or misleading in substance or a suppression of any material fact the name of the petitioner may be removed from the Roll.

It recognises by implication that everything may have appeared to be alright to everybody at the time of admission but yet something may be found to be not right after admission so that the advocate and solicitor concerned is at risk of being removed from the Roll. It implies that the fact that the Bar

Council do not object at the time of admission does not mean that they guarantee that nothing is wrong with the petition. It only means that as far as they can see at the time everything is alright. They are given a right to object to admission but the right does not come with a duty to the petitioner to ensure that the petition is in order. Of course the fact that a petition has to be served on them and they have a right to object to a petition implies that they are expected to carry out a measure of verification of the petition, but the expectation is that of the public, and if fulfilling that expectation is a duty, it is a duty that they owe to the public, so that if they disappoint the expectation, and a person who is not qualified in every sense is admitted, they may be subject to public criticism but the petitioner or his master cannot hold it against them so as to bar them from acting to put matters right. The Bar Council owe no duty to a petitioner or his master to ensure that they have the necessary qualifications in relation to the petitioner's admission. They are not dependent on the Bar Council in that respect. The duty is solely theirs to ascertain whether or not they are qualified.

There is another way of looking at the question of the fourth declaration. It is sought by the plaintiffs. This is their application, which is made as a result of some arrangement or understanding with the Bar Council. Essentially what the Bar Council have been doing as regards the fourth declaration is to oppose the making of it. Whether or not the Bar Council are estopped from opposing it, the declaration cannot be made in view of the fact that the second plaintiff is liable to be removed from the Roll under s. 17(3) and such a declaration might embarass a decision under that section, which is undesirable. Alternatively, if it will not have such an effect, the declaration will be in vain because no one is or will be challenging the order of admission or the fact that the second defendant has become an advocate and solicitor since the order was made. The jeopardy that the second plaintiff will face as a result of my interpretation of s. 13(1) is removal from the Roll under s. 17(3), not a reversal of the order of admission.

The fourth declaration must, therefore, be refused.

That brings me to another consideration. I mentioned this to Tuan Haji Sulaiman for the Bar Council in the course of submission and he seemed content to accept my decision on the point, and strictly I need not go into it to dispose of the present application, but I think it will be useful to set it down with a little elaboration. The point is this. With the refusal of the fourth declaration, the second plaintiff's name is nevertheless still on the Roll. If her name is to be removed from the Roll as a result of what has transpired on this application, that can only be done under s. 17(3). The question is whether the fact that I refuse the first declaration because I find, on a proper

construction of s. 13(1), that the second plaintiff has not served her period of pupillage with a master who was qualified under the section is to be followed inevitably with the consequence that the name of the second plaintiff be removed from the Roll under s. 17(3). I do not think that it should. In the first place, if the plaintiffs had not made the present application, the court will have to be moved by the Bar Council or some other party with the proper locus to act under s. 17(3). I think the position should not be different just because the plaintiffs have come to court first to clear themselves. There is virtue in leaving it to the Bar Council to expressly move the court in that they will have an opportunity, if they have not already done so, to deliberate on the matter before deciding to act. In the second place, the Bar Council will have to bring their case within the terms of s. 17(3), which would require the offending "petition, affidavit, certificate or other document filed by (the) petitioner" to be before the court, and it is not before the court presently. As has been seen, it is said in the present application to be the "Form concerning Particulars of Master". In the third place, considering the nature and circumstances of this case, there may be questions and principles to be considered and debated, and considerations to be taken into account, for a decision under s. 17(3), for which the necessary factual material is not before the court.

I dismiss this application. As agreed between the plaintiffs and the Bar Council, I make no order as to costs.